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Ong Siew Hwa v UMW Toyota Motor Sdn Bhd

B FEDERAL COURT (PUTRAJAYA) — CIVIL APPEAL NO 02(f)-18–02 OF 2015(A)
AHMAD MAAROP CJ (MALAYA), HASAN LAH, ABU SAMAH, ZAHARAH IBRAHIM AND BALIA YUSOF FCJJ
15 MAY 2018

C

Hire Purchase — Hire purchase agreement — Agreement for sale of car — Car gave problems since first day of purchase — Whether contractual relationship between dealer/supplier and consumer superseded by hire purchase agreement — Whether case of Ahmad Ismail v Malaya Motor Company applied D *— Whether dealer/supplier liable to consumer — Whether there was contract of sale — Consumer Protection Act 1999 s 32 — Sale of Goods Act 1957 s 16*

The appellant ('the plaintiff') was a trader who wanted to buy a new car, namely Toyota Camry. He went to the respondent's ('the first defendant') E branch in Taiping. The plaintiff made an order for the car and paid a deposit of RM5,000. Upon being informed that the car had arrived, the plaintiff paif RM66,706.45, making a total of RM71,706.45 paid by him to the first defendant. The purchase price for the car was RM151,706.45. The plaintiff then entered into a hire purchase agreement with the second defendant. The F plaintiff encountered problems with the car on the day he took possession of the car itself. He took the car for repairs for several times. The first defendant's attempts at resolving the mechanical problems of the car were not successful and the problems persisted. The plaintiff left the motorcar at the first defendant's Ipoh Service Centre. The plaintiff sued the first and second G defendant and sought: (a) the termination of the contract of the sale of the car; (b) the return of the sum of RM151,706.45 being the purchase price of the car; (c) general damages; and (d) specific damages in the sums of RM30,000 being the amount of car rentals. The High Court dismissed the plaintiff's claim against the first defendant but allowed his claim against the second defendant. H Upon appeal, the Court of Appeal: (i) allowed the second defendant's appeal on the ground that the plaintiff's statement of claim did not plead and did not disclose any cause of action against the second defendant; and (ii) dismissed the plaintiff's appeal against the rejection of his claim against the first defendant. Hence, the present appeal. The issue that arose was whether the contractual I relationship between the dealer/supplier and the consumer superseded by the hire purchase agreement, as stated in *Ahmad Ismail v Malaya Motor Company & Anor* ('Ahmad Ismail'), or does s 32 of the Consumer Protection Act 1999 ('the CPA') and/or s 16 of the Sale of Goods Act 1957 ('the SOGA') apply making the dealer/supplier liable to the consumer.

Held, dismissing the appeal with costs:

(1) The plaintiff and the second defendant entered into a hire purchase agreement. Under this hire purchase agreement, the plaintiff was 'the hirer' of the car while the second defendant was 'the owner'. What was obtained by the plaintiff was possession, not ownership of the car which remained with the second defendant (see para 37).

(2) Under cl 17 (option to purchase) of the agreement, was provided that if the hirer duly performed and observed all the stipulations and conditions in this agreement and pay to the owner all sums of money payable to the owner by the hirer, the hirer shall have an option of purchasing the goods and upon payment of the last instalment, the hirer was deemed to have exercised such option and the hiring shall come to an end and the goods shall become the property of the hirer and the owner shall assign all rights, benefits and interests in the goods to the hirer. However, until the option has been exercised, the goods shall remain the absolute property of the owner and the hirer shall not have any right or interest in the goods other than of a bailee (see para 37).

(3) Applying *Ahmad Ismail* to the facts of this case, whatever contractual relationship between the plaintiff and the first defendant was superseded by the hire purchase agreement. The first defendant completely faded out of the picture, and the only contract that remained was the hire purchase agreement entered into between the plaintiff and the second defendant (see para 38).

(4) Until the execution of the hire purchase agreement, there was no contract of sale, exchange or lease under which the ownership of the car or possession in law of the car was transferred by the first defendant to the plaintiff. With the execution of the agreement, the only contract that remained was the agreement. It was under the agreement that the possession in law of the car was transferred to the plaintiff, as hirer, by the second defendant, as owner, not the first defendant. Hence, under the CPA, the first defendant was not the supplier of the car to the plaintiff (see para 44).

[Bahasa Malaysia summary

Perayu ('plaintif') adalah peniaga yang ingin membeli kereta baharu, iaitu Toyota Camry. Dia telah ke cawangan responden ('defendan pertama') di Taiping. Plaintif membuat pesanan untuk kereta tersebut dan membayar deposit sebanyak RM5,000. Apabila dimaklumkan bahawa kereta itu telah tiba, plaintif membayar RM66,706.45, menjadikan total sebanyak RM71,706.45 dibayar olehnya kepada defendan pertama. Harga belian untuk kereta itu adalah RM151,706.45. Plaintif kemudiannya memeterai perjanjian sewa beli dengan defendan kedua. Plaintif menghadapi masalah dengan kereta tersebut pada hari dia memiliki kereta itu sendiri. Dia membawa kereta

tersebut untuk dibaiki buat beberapa kali. Percubaan defendan pertama untuk menyelesaikan masalah mekanikal kereta tidak berjaya dan masalah terus berlanjut. Plaintif meninggalkan kereta tersebut di Pusat Perkhidmatan Ipoh defendan pertama. Plaintif menyaman defendan pertama dan kedua dan memohon: (a) penamatan kontrak jualan kereta tersebut; (b) pemulangan sebanyak RM151,706.45 sebagai harga belian kereta; (c) ganti rugi am; dan (d) kerosakan tertentu dalam jumlah sebanyak RM30,000 yang merupakan jumlah penyewaan kereta. Mahkamah Tinggi menolak tuntutan plaintif terhadap defendan pertama tetapi membenarkan tuntutannya terhadap defendan kedua. Atas rayuan, Mahkamah Rayuan: (i) membenarkan rayuan defendan kedua atas alasan bahawa pernyataan tuntutan plaintif tidak memplidkan dan tidak mendedahkan apa-apa kausa tindakan terhadap defendan kedua; dan (ii) menolak rayuan plaintif terhadap penolakan tuntutannya terhadap defendan pertama. Oleh itu, rayuan ini. Isu yang timbul adalah sama ada hubungan kontrak antara peniaga/pembekal dan pengguna yang digantikan oleh perjanjian sewa beli, seperti yang dinyatakan dalam *Ahmad Ismail v Malaya Motor Company & Anor* ('Ahmad Ismail'), atau s 32 Akta Perlindungan Pengguna 1999 ('APP') dan/atau s 16 Akta Jualan Barangan 1957 ('SOGA') terpakai dan menjadikan peniaga/pembekal bertanggungjawab terhadap pengguna.

Diputuskan, menolak rayuan dengan kos:

(1) Plaintif dan defendan kedua memeterai perjanjian sewa beli. Bawah perjanjian sewa beli ini, plaintif adalah 'penyewa' kereta manakala defendan kedua adalah 'pemilik'. Apa yang diperoleh oleh plaintif adalah milikan, bukan hak milik kereta yang kekal dengan defendan kedua (lihat perenggan 37).

(2) Bawah 'cl 17 (option to purchase)' perjanjian, diperuntukkan bahawa jika penyewa melaksanakan dan mematuhi semua ketetapan dan syarat-syarat dalam perjanjian dan membayar kepada pemilik semua jumlah yang harus dibayar kepada pemilik oleh penyewa, penyewa hendaklah mempunyai pilihan untuk membeli barang tersebut dan setelah dibayar ansuran terakhir, penyewa dianggap telah melaksanakan pilihan tersebut dan penyewaan akan berakhir dan barang tersebut menjadi milik penyewa dan pemiliknya akan menyerahkan semua hak, faedah dan kepentingan dalam barangan tersebut kepada penyewa. Walau bagaimanapun, sehingga pilihan ini dilaksanakan, barangan tersebut akan kekal sebagai harta mutlak pemilik dan penyewa tidak akan mempunyai apa-apa hak atau kepentingan dalam barangan selain daripada seorang *bailee* (lihat perenggan 37).

(3) Mengguna pakai *Ahmad Ismail* pada fakta kes ini, apa-apa hubungan kontrak antara plaintif dan defendan pertama digantikan oleh perjanjian sewa beli. Defendan pertama tiada lagi dalam gambaran dan satu-satunya

kontrak yang kekal adalah perjanjian sewa beli yang ditandatangani antara plaintif dan defendan kedua (lihat perenggan 38).

(4) Sehingga pelaksanaan perjanjian sewa beli, tidak ada kontrak jualan, pertukaran atau pajakan bawah mana milikan kereta atau hak milik kereta bawah undang-undang dipindahkan oleh defendan pertama kepada plaintif. Dengan pelaksanaan perjanjian tersebut, satu-satunya kontrak yang kekal adalah perjanjian. Bawah perjanjian, milikan dalam undang-undang kereta itu dipindahkan kepada plaintif, sebagai penyewa, oleh defendan kedua, sebagai pemilik, bukan defendan pertama. Oleh itu, bawah APP, defendan pertama bukan pembekal kereta kepada plaintif (lihat perenggan 44).]

Notes

For a case on agreement for sale of car, see 7(3) *Mallal's Digest* (5th Ed, 2017 Reissue) para 5094.

Cases referred to

Ahmad Ismail v Malaya Motor Company & Anor [1973] 2 MLJ 66, FC (folld)
AmBank (M) Bhd (formerly known as Arab-Malaysia Bank Bhd) v Luqman Kamil bin Mohd Don [2012] 3 MLJ 1, FC (refd)
Anglo-American Corporation (M) Sdn Bhd v Dato' Phua Cheng Leong [1969] 2 MLJ 12, FC (refd)
Bridge v Campbell Discount Co Ltd [1962] 1 All ER 385, HL (refd)
Butterworth Used Cars Sdn Bhd lwn Mayban Finance [1991] MLJU 19; [1991] 1 CLJ Rep 520, HC (refd)
Chan Hoon Piaw & Anor v Cempaka Finance Bhd [2002] MLJU 812; [2003] 1 CLJ 762, HC (refd)
Cooper v Ashley & Johnson Motors Ltd [1997] DCR 170; 1996 NZDCR Lexis 19; (1996) 7 TCLR 407 (refd)
Credit Corporation (M) Bhd v The Malaysia Industrial Finance Corpn & Anor [1976] 1 MLJ 83 (refd)
Drury v Victor Buckland Ltd [1941] 1 All ER 269, CA (refd)
Hazlinda bte Hamzah v Kumon Method of Learning Centre [2006] 3 MLJ 124, CA (refd)
Helby v Matthews and others [1895] AC 471, HL (refd)
Heng Long Motor Trading Co v Osman bin Abdullah [1994] 2 MLJ 456, HC (refd)
Lee v Butler [1893] 2 QB 318, CA (refd)
Malayan Credit Ltd v Mohamed Kassim [1965] 2 MLJ 134 (refd)
Matang Plastik & Metal Work Industries Sdn Bhd & Ors v Daimler Chrysler (M) Sdn Bhd & Ors [2014] 6 MLJ 244; [2014] MLRAU 1, CA (refd)
Palm Oil Research And Development Board Malaysia & Anor v Premium Vegetable Oils Sdn Bhd & another appeal [2005] 3 MLJ 97, FC (refd)
Poraviappan a/l Arunasalam Pillay (suing as administrator of estate of the late

Nadarajah a/l Sithambaram Pillai) v Periasamy a/l Sithambaram Pillai & Ors (on behalf of personal representatives of the estate of Ponnamal a/p Ramasamy the deceased) [2015] 4 MLJ 285; [2015] 6 CLJ 857, FC (refd)
PP v Viran [1947] 1 MLJ 62 (refd)
Puncak Niaga (M) Sdn Bhd v NZ Wheels Sdn Bhd [2012] 1 MLJ 27; [2011] 9 CLJ 833, CA (refd)
Saiman bin Umar v Lembaga Pertubuhan Peladang and another appeal [2015] 6 MLJ 492, FC (refd)
Stephens v Chevron Motor Court Ltd [1996] DCR (NSW) 1; 1996 NZDZR Lexis 29 (refd)
United Engineers (Malaysia) Ltd v Lai Ping Yoon [1968] 1 MLJ 189 (refd)
Yong Kar Mun v PP [2012] 6 MLJ 209, CA (refd)

Legislation referred to

Consumer Protection Act 1999 ss 2(4), 3, 31, 32, 33, 33(a), (b), 34, 35, 36, 37, 38, 39, 47, 50(c), Part VI
Courts of Judicature Act 1964 s 78(1)
Firearms and Ammunitions (Unlawful Possession) Ordinance 1946 s 3
Hire-Purchase Act 1967 ss 6(1)(b), 8, 31, 32(2), 33, 34, 38, 47
Interpretation Acts 1948 and 1967 s 17A
Consumer Guarantees Act 1993 [NZ]
Sale of Goods Act 1893 [UK] ss 1, 14, 25(2)
Sale of Goods Act 1957 ss 4, 16, 16(1)

Appeal from: Civil Appeal No A-02–1777–08 of 2013 (Court of Appeal, Putrajaya)

N Vijayasegaran (M Mathialagan with him) (Madhi Param & Co) for the appellant.
Jasmeetpal Singh (Siew & Jasmeet) for the respondent.

Ahmad Maarop CJ (Malaya):

[1] The judgment is prepared pursuant to s 78(1) of the Courts of Judicature Act 1964, as our learned brother, Justice Abu Samah Nordin FCJ has since retired.

[2] The parties will be referred to as they were in the High Court.

[3] This case concerns the appeal by the plaintiff against the decision of the Court of Appeal which, on 9 January 2014, dismissed the plaintiff's appeal against the High Court's decision which had, on 24 April 2013, dismissed the plaintiff's claim against the first defendant.

[4] The brief background facts leading to the present appeal are these. The plaintiff was a trader. He wanted to buy a new car (Toyota Camry). He went to the first defendant's branch in Taiping. The first defendant was an importer and distributor of Toyota cars in Malaysia. The plaintiff made an order for the car and paid a deposit of RM5,000. On 19 March 2010, on being informed that the car as ordered had arrived, the plaintiff went to the first defendant's office. He paid RM66,706.45, making a total of RM71,706.45 paid by him to the first defendant. The purchase price of the car was RM151,706.45. The first defendant arranged for credit facilities for the plaintiff from the second defendant. Credit facilities for the balance of the purchase price (RM80,000) was provided to the plaintiff by the second defendant. Then, on 22 March 2010, the plaintiff entered into a hire purchase agreement with the second defendant. On the same day, the plaintiff took possession of the car which had been registered with the registration number of AHC 9928. On that day itself the plaintiff encountered problems with the car. He complained to the first defendant's representative that the car was wobbling and the steering wheel was pulling to the left side. Thereafter, the plaintiff took the said car for repairs several times. The first defendant's attempts at resolving the mechanical problems of the car were not successful, and the problems persisted. On 8 December 2010, the plaintiff left the motorcar at the first defendant's Ipoh service centre. Indeed, according to the Court of Appeal, the fact that the car was defective when the plaintiff took possession of it was not really in issue.

[5] The plaintiff then sued the first defendant first and later amended his statement of claim to include the second defendant. The plaintiff prayed for the following orders against the defendants:

(a) termination of the contract of sale of the car;

(b) the return of the sum of RM151,706.45 being the purchase price of the car;

(c) general damages;

(d) special damages in the sum of RM30,000 being the amount of car rentals; and

(e) interests and costs.

[6] After a full trial, the High Court dismissed the plaintiff's claim against the first defendant.

[7] The High Court however allowed the plaintiff's claim against the second defendant. In allowing the plaintiff's claim against the second defendant, the High Court held:

... where a vehicle which was the subject matter of hire purchase agreement has been

declared to be unacceptable quality [sic] the plaintiff is entitled to reject and return the goods which the plaintiff in my judgment has properly done in accordance with the provisions of the Consumer Protection Act 1999. The plaintiff is therefore entitled to the return of all sums paid to the second defendant and damages of RM30,300.

[8] The Court of Appeal allowed the second defendant's appeal against the aforesaid decision of the High Court apparently on the ground that the plaintiff's statement of claim did not plead and did not disclose any cause of action against the second defendant. There was no further appeal by the plaintiff against that decision of the Court of Appeal.

[9] On the rejection of his claim against the first defendant, the plaintiff appealed to the Court of Appeal which dismissed it. On 27 January 2015, this court allowed the plaintiff's application for leave to appeal against that decision of the Court of Appeal on the following question of law (pp 1–3 *rekod rayuan tambahan*):

> Is the contractual relationship between the dealer/supplier and the consumer superseded by the Hire Purchase Agreement, as stated in the former Federal Court case of *Ahmad Ismail v Malaya Motor Company* [1973] 2 MLJ 66, or does section 32 of the Consumer Protection Act 1999 and/or section 16 of the Sale of Goods Act 1957 apply making the dealer/supplier liable to the Consumer?
>
> [Adakah hubungan kontrak di antara peniaga/pembekal 'dealer/supplier' dan pengguna 'fade away' setelah Perjanjian Sewa Beli ditandatangani sepertimana yang dinyatakan dalam kes Mahkamah Persekutuan *Ahmad Ismail v Malaya Motor Company* [1973] 2 MLJ 66 atau adakah Seksyen 32 Akta Perlindungan Pengguna 1999 dan/atau Seksyen 16 Akta Jualan Barangan 1957 terpakai dengan menjadikan peniaga/pembekal 'dealer/supplier' bertanggungjawab kepada pengguna?]

IN THE HIGH COURT

[10] According to the High Court, the real issue before the court was the nature of the transaction between the plaintiff and the defendants and the applicable law which governed the transaction. The High Court observed that a transaction as in the case before it could be either *a sale* or hire purchase transaction. The High Court said the crux of the plaintiff's case was that the transaction between him and the first defendant was a sale transaction. Having considered all the evidence before it, the High Court concluded that the transaction of the purchase of the car was in fact a hire purchase transaction. The High Court then ruled that the plaintiff was 'incorrect in making the first defendant as a party to the proceeding' before it. Consequentially, the case against the first defendant was dismissed.

[11] The High Court next considered the plaintiff's case against the second

defendant. The High Court held that although the transaction was a hire purchase transaction, the plaintiff was not without a remedy. In this regard the High Court said:

> However despite the transaction being a hire purchase transaction the plaintiff is not devoid of a remedy. It is my considered judgment that the plaintiff is entitled to maintain this action against the second defendant in view of the provisions of the Consumer Protection Act 1999.

[12] The High Court eventually found that the second defendant was a 'supplier' under the Consumer Protection Act 1999, ('the CPA') and held it to be liable to the plaintiff under s 32 of the CPA for breach of the implied term of acceptable quality. Consequently, the High Court made the order (which we set out in para (7) of this judgment), against the second defendant.

IN THE COURT OF APPEAL

[13] In respect of the claim by the plaintiff against the first defendant, the Court of Appeal said the central issue was whether the plaintiff's claim against the first defendant under the CPA and the Sale of Goods Act 1957 ('the SGA') was sustainable as the car was supplied by the second defendant under a hire purchase agreement. According to the Court of Appeal, the question concerned capacity, namely, whether the plaintiff had the contractual right to sue the car dealer (the first defendant) in the first place. Applying the case of *Ahmad Ismail v Malaya Motor Company & Anor* [1973] 2 MLJ 66 (FC), the Court of Appeal said:

> Regardless of whether the plaintiff's claim is founded on the CPA or the SGA 1957, the plaintiff must cross the threshold of establishing that he has a contractual relationship with the car dealer in order to found the claim. The ratio decidendi of the Federal Court in *Ahmad Ismail*'s case is quite clear. Once the plaintiff has entered into the hire-purchase agreement with the finance company, any contractual relationship between the plaintiff and the car dealer has been extinguished; the legal effect of which is that the plaintiff has no claim against the car dealer ... the plaintiff's claim against the first defendant is unsustainable. There is no contractual relationship between the plaintiff and the first defendant to found the basis of the claim under the CPA 1999 and or the SGA 1957. Accordingly, the appeal was dismissed with costs.

SUBMISSION OF THE PLAINTIFF

[14] The thrust of the submission advanced by learned counsel for the plaintiff is as follows: The plaintiff's cause of action was based on the CPA. Learned counsel contended that the decisions of the courts below in relying on *Ahmad Ismail* and holding that upon the signing of the hire purchase agreement, the contract between the plaintiff and the first defendant faded

away was wrong, for a number of reasons. Firstly, learned counsel argued that the documents produced in evidence established that the first defendant was a supplier and dealer. Relying on the definition of 'manufacturer' under s 3 of the CPA, it was also contended that the first defendant was also the manufacturer of the car. Learned counsel referred to ss 3, 32, 33(a) and (b), 38, 39, 47 and 50(c) of the CPA. Learned counsel submitted the fact that the car was defective and not of acceptable quality was not in dispute. According to him, what was in issue was the liability of the first defendant under the CPA. He further submitted that it was normal for the dealer to give warranty for five years for labour and parts. However, according to him, when the plaintiff wanted to enforce the warranty, *Ahmad Ismail* prevented him from doing so on the ground that under the hire purchase, the owner was the financier and the dealer faded away — the contract with the dealer disappeared. According to learned counsel, that was absurd. He contended that *Ahmad Ismail* might be right then, but was wrong after the coming into force of the CPA which was enacted to protect consumers. He said that the CPA was not in contradiction with the Hire-Purchase Act 1967 ('the HPA'). In fact to a question by one of the panel members of this court, he agreed that the CPA was supplemental to the HPA. However, he submitted that to deny the consumer's right was contrary to law.

[15] Next, referring to the invoice dated 19 January 2010 issued by the first defendant (exh P3, p 268, *rekod rayuan* (*Jld* 6)), learned counsel pointed out that RM71,706.45 was paid to the first defendant, and this, he argued, established the existence of the contract of sale between the plaintiff and the first defendant. This was further supported by the delivery order dated 19 March 2010 (exh P6, p 269, *rekod rayuan* (*Jld* 6)) issued by the first defendant. Learned counsel also submitted that the letters at pp 12 and 28 of the common bundle of documents showed that there was a warranty given by the first defendant to the plaintiff. He argued that this warranty, given during the sale was still subsisting even after the hire purchase agreement was executed.

[16] Learned counsel also argued that the CPA should be interpreted using the purposive approach pursuant to s 17A of the Interpretation Acts 1948 and 1967. In support of his argument he referred to *Yong Kar Mun v Public Prosecutor* [2012] 6 MLJ 209, *Palm Oil Research And Development Board Malaysia & Anor v Premium Vegetable Oils Sdn Bhd & another appeal* [2005] 3 MLJ 97 and *Hazlinda bte Hamzah v Kumon Method of Learning Centre* [2006] 3 MLJ 124. He submitted that it was clear that the general purpose and intent of the CPA, taken as a whole, was to confer protection and remedy to consumers where the goods supplied were not of acceptable quality. He urged the court to take a holistic approach. He submitted that the CPA was enacted to give new rights to consumers and to avoid judicial decisions as in *Ahmad Ismail*. He argued that the CPA was enacted with the sole purpose of protecting the right of consumers. In this regard, he referred to p 788 of *NS Bindra's*

Interpretation of Statutes where it was stated that:

> If a statute creates new circumstances which render the earlier decision inapplicable, the effect must be evade to earlier decision of the court. The earlier decision then cannot operate because the new statute alters the circumstances to which the old decision applied and as the cause of action is different, the earlier decision ceases to play a part.

[17] He also referred to p 167 of the same book where it was stated that:

> The legislature must be presumed to know the course of the legislation as well as the course of judicial decisions in the country.

Learned counsel then submitted that this must necessarily mean that when enacting the CPA, the legislature must be taken to be aware of *Ahmad Ismail* and its implication.

[18] In support of his submission, learned counsel also relied on the following cases:

(1) *Stephens v Chevron Motor Court Ltd* [1996] DCR (NSW) 1; 1996 NZDZR Lexis 29;

(2) *Cooper v Ashley & Johnson Motors Ltd* [1997] DCR 170; 1996 NZDCR Lexis 19; (1996) 7 TCLR 407;

(3) *Puncak Niaga (M) Sdn Bhd v NZ Wheels Sdn Bhd* [2012] 1 MLJ 27; [2011] 9 CLJ 833;

(4) *Matang Plastik & Metal Work Industries Sdn Bhd & Ors v Daimler Chrysler (M) Sdn Bhd & Ors* [2014] 6 MLJ 244; [2014] MLRAU 1; and

(5) *Heng Long Motor Trading Co v Osman bin Abdullah* [1994] 2 MLJ 456.

SUBMISSION OF THE FIRST DEFENDANT

[19] The submission of learned counsel for the first defendant in substance is as follows. The question of law posed consists of the following three parts:

(a) whether the decision of this honourable court in *Ahmad Ismail v Malaya Motor Company & Anor* [1973] 2 MLJ 66 to the effect that the contractual relationship between a dealer/supplier and a consumer is superseded by a hire purchase agreement, is a correct statement of the law? or

(b) regardless of the existence of a hire purchase agreement, does s 16 of the SGA apply to make the dealer/supplier liable to the consumer? and/or

(c) regardless of the existence of a hire purchase agreement, does s 32 of the

CPA apply to make the dealer/supplier liable to the consumer?

[20] However, according to learned counsel, there is only one core legal issue — given the hire purchase agreement entered into between the plaintiff and the second defendant, was there still a contract of sale between the plaintiff and the first defendant? Bearing in mind that in his pleading, the plaintiff essentially was seeking for the revocation of the contract of sale (*membatalkan kontrak jualan kenderaan No AHC 9928*) and the refund of the purchase price, the whole case of the plaintiff rested on the issue of whether there was a contract of sale of the car between the plaintiff and the first defendant. This, learned counsel said, was strictly a case on s 32 of the CPA as indeed was the crux of the plaintiff's argument in the courts below. Sections 33, 34, 38 and s 47 of the HPA were not within the ambit of the leave questions.

[21] On the question whether the CPA affects the hire purchase and the law, learned counsel referred to ss 3 and 47 of the CPA. Under s 3, 'supplier' means a person who, in trade, supplies goods to a consumer by transferring *the ownership* or the possession of goods under a contract of sale, exchange, lease, or hire or *hire purchase* to which that person is a party. Section 47 provides for assessment of damages in case of hire purchase agreements. So, according to learned counsel, the CPA recognised the concept of hire purchase. In addition, learned counsel submitted that by virtue of s 2(4) of the CPA, the application of the CPA shall be supplemental in nature, and *without prejudice* to any other law (which includes written law and case law) which regulates contractual relations. The CPA does not override and does not do away with the contractual relations of hire purchase. So, according to learned counsel, if the car was sold to the financier (like the second defendant in this case), which then transferred possession to the hirer, the HPA will apply. In such a case it is not possible for the same car to be sold to the customer (hirer) and also to the finance company. The hirer will not be without any remedy. Learned counsel contended that the hirer's recourse (as rightly held by the High Court in this case) was against the financier (the second defendant).

[22] Learned counsel submitted that the hire purchase transaction is not a contract of sale. It is a bailment coupled with an option to buy. Once the hire purchase agreement is executed between the customer (hirer) and the finance company (owner), the dealer 'drops out'. Learned counsel then referred to *Helby v Matthews and others* [1895] AC 471, *Anglo-American Corporation (M) Sdn Bhd v Dato' Phua Cheng Leong* [1969] 2 MLJ 12 (FC), *United Engineers (Malaysia) Ltd v Lai Ping Yoon* [1968] 1 MLJ 189 and *Malayan Credit Ltd v Mohamed Kassim* [1965] 2 MLJ 134. Thus, according to learned counsel there is nothing new in *Ahmad Ismail*. Learned counsel submitted that *Ahmad Ismail* had been unjustly criticised. He submitted that the principle of law that in a hire purchase transaction there is no contract of sale or an agreement to sell

between the dealer and the customer, and that the customer will cease to have any contractual relationship with the dealer, was well settled by the highest authorities which can be traced back to as early as 1895 with the case of *Helby v Matthews*. *Helby v Matthews* was referred to in *Anglo-American Corporation (M) Sdn Bhd*, and *United Engineers (Malaysia) Ltd*. Learned counsel submitted that from those authorities the principles of law established are clear where there is a hire purchase transaction. The goods in question are sold to and bought by the finance company. Property in those goods passes to the finance company who in law becomes the owner of the said goods. Unless and until the consumer fulfils all conditions under the hire purchase agreement and exercises the option to buy, he is merely a hirer and a bailee pursuant to the hire purchase agreement. The result is that there is no contract of sale or an agreement to purchase as between the dealer and the consumer.

[23] He submitted that in a hire purchase agreement, the finance company who is described as the owner will buy the vehicle, and then hire it out to the customer who is described as the hirer. It is not possible for the same vehicle to be sold to the customer and also to the finance company. It is for this reason that the initial contract of sale between the car dealer and the customer will fade away and be superseded by the hire purchase agreement making the finance company the owner of the vehicle. He submitted that from the authorities he had referred to, it was clear that *Ahmad Ismail*'s case did not propound any novel principle of law; the court was merely re-stating a settled and entrenched principle both here and in England. He submitted that upon the coming into existence of the hire purchase agreement made between the plaintiff and the financier (the second defendant), the contractual relationship between the first defendant and the plaintiff had been superseded by the said hire purchase agreement.

DECISION OF THIS COURT

[24] In his submission before us, learned counsel for the plaintiff also argued on the liability of the first defendant under the CPA as a 'manufacturer'. In his submission, learned counsel for the first defendant contended that this was raised for the first time in this court and that the point was not pleaded by the plaintiff. We agree. It is well settled that the court should not decide on an issue that was not pleaded by the parties. Where a vital issue was not raised in the pleadings it cannot be allowed to be argued and to succeed on appeal (see *AmBank (M) Bhd (formerly known as Arab-Malaysia Bank Bhd) v Luqman Kamil bin Mohd Don* [2012] 3 MLJ 1 (FC), *Poraviappan a/l Arunasalam Pillay (suing as administrator of estate of the late Nadarajah a/l Sithambaram Pillai) v Periasamy a/l Sithambaram Pillai & Ors (on behalf of personal representatives of the estate of Ponnamal a/p Ramasamy the deceased)* [2015] 4 MLJ 285; [2015] 6 CLJ 857 (FC), *Saiman bin Umar v Lembaga Pertubuhan Peladang and another appeal* [2015] 6 MLJ 492). We have considered the pleadings of the

plaintiff, and the submissions made on his behalf in the courts below. We agree that the plaintiff's case against the first defendant was its liability as a 'supplier' for the alleged breach of the provision relating to implied guarantee as acceptable quality under s 32 of the CPA, and alternatively, for breach of the provision relating to implied condition as to quality and fitness under s 16 of the SGA. This position is also reflected in the memorandum of appeal filed by the plaintiff for the purpose of the appeal to this court (see pp 8–10, *rekod rayuan* (*Jld* 1)). Indeed, this is also reflected in the question of law in respect of which leave to appeal to this court was allowed.

[25] This brings us to that question which we set out at para 9 of this judgment. First, the question refers to the contractual relationship between the 'dealer/supplier' and the consumer being superseded by the hire purchase agreement as stated in *Ahmad Ismail*. 'Supplier' is defined under s 3 of the CPA which includes a person who, in trade, supplies goods to a consumer by *transferring* the *ownership* or *possession* of the goods under *a contract of hire purchase*. In the context of the question and the facts of this case, it does not make sense to talk about the contractual relationship between the supplier (as person who transfers possession of the goods under a hire purchase), thus the contractual relationship was the hire purchase agreement, being superseded by hire purchase agreement. In our view therefore, the words 'the dealer/supplier' in the question should be substituted with the words 'the dealer'.

[26] The question of law posed raises the issue of applicability of the principle decided by this court in *Ahmad Ismail* to the transaction relating to the purchase of the car in this case. As would be recalled, the High Court found the transaction to be a hire purchase transaction. It applied *Ahmad Ismail* and held that it was not correct for the plaintiff to have sued the first defendant in this case. It dismissed the plaintiff's case. The Court of Appeal affirmed the High Court's decision, and applying *Ahmad Ismail*, held that 'once the plaintiff has entered into the hire purchase agreement with the finance company, any contractual relationship between the plaintiff and the car dealer has been extinguished; the legal effect of which is that the plaintiff has no claim against the car dealer ... the plaintiff's claim against the first defendant is unsustainable. There is no contractual relationship between the plaintiff and the first defendant to found the basis of the claim under the CPA and/or the SGA 1957'.

[27] In *Ahmad Ismail*, the plaintiff wanted to buy a second hand Morris car bearing registration No BW 343 from the first defendant, a car dealer, for $4,900. The plaintiff turned in his own car for which he was given a credit of $1,200. He also paid the first defendant $1,000 in cash. He had to find another $2,700. It was agreed that this should be settled on or before 19 December 1969, failing which the deposit of $1,000 cash would be forfeited. Since the

plaintiff had no money to pay for the balance of the purchase price, he was introduced by the car dealer to the second defendant (a finance company), resulting in the plaintiff entering into a hire purchase agreement with the second defendant, under which the second defendant was referred to as 'the owner' of the car, and the plaintiff as 'the hirer'. Under the agreement, the plaintiff was to pay the second defendant monthly instalments of $150 each beginning on 19 January 1970. The plaintiff paid four instalments. On 30 April 1970, the car was detained by the police on suspicion that it had been stolen. The plaintiff stopped paying the monthly instalments. On 4 July 1970, the plaintiff terminated the hire purchase agreement. The plaintiff sued the first and the second defendants in the sessions court for damages for breach of contract, alleging that there had been a breach of the implied condition under s 6(1)(b) of the HPA that the owner shall have the right to sell the goods at the time when the property was to pass. The learned President of the Sessions Court dismissed the claim against the first defendant, holding that after the plaintiff had gone to the finance company, the car dealer faded out of the picture and there ceased to be any contractual relationship between him and the plaintiff. The learned President also dismissed the claim against the finance company on the ground that there was no proof that the car had been stolen (this was agreed by counsel before him) and therefore there had been no breach by the finance company of the condition implied by s 6(1)(b). The plaintiff appealed to the High Court, which dismissed his appeal. The plaintiff's appeal to the Federal Court was also dismissed. It was held that the sale agreement between the first defendant (the car dealer) and the plaintiff was superseded by the hire purchase agreement and therefore the plaintiff had no claim against the first defendant. In delivering the judgment of the court, Suffian FJ (as His Lordship then was) said at p 67:

> The learned President on 18th December, 1971, dismissed the claim against the first defendant, *holding that after the plaintiff had gone to the finance company, the car dealer faded out of the picture and there ceased to be any contractual relationship between him and the plaintiff.*
>
> The learned President also dismissed the claim against the finance company on the ground that there was no proof that the car had been stolen (this was agreed by counsel before him) and therefore there had been no breach by the finance company of the condition implied by section 6(1)(a).
>
> The plaintiff appealed to the High Court, which dismissed his appeal.
>
> He has now appealed to us.
>
> The questions to be determined in this appeal are as follows. *After the execution of the hire-purchase agreement between the plaintiff and the finance company did there remain any contractual relationship between the plaintiff and the car dealer so that the plaintiff has a claim against him?* ...
>
> ...

The first ground of appeal concerns only the first defendant. *It is said that the learned appellate judge was wrong in holding that there remained no contractual relationship between the plaintiff and the first defendant. It is said that despite the existence of the hire-purchase agreement there still remained a contractual relationship between the two of them* and that the learned appellate judge should have held that the first defendant had only assigned his rights in the car to the finance company.

We regret we cannot accept this argument. *It is true that by exhibits P1 and P2 there was a sale by the car dealer of the car to the plaintiff on certain conditions. But ultimately these documents were superseded by the hire- purchase agreement exhibit P3* and from the language of this document *it is plain that the car dealer completely faded out of the picture and the only contract that remained then was between the plaintiff and the finance company*, and accordingly the plaintiff has no claim against the car dealer.

[28] The working of the principle that the hire purchase agreement supersedes the sale by the car dealer to the plaintiff and that the former completely fades out of the picture leaving the hire purchase agreement between the plaintiff and finance company as the only contract in respect of the car can be seen in the description of the nature of a modern hire purchase transaction by Lord Denning in his judgment in the House of Lords case of *Bridge v Campbell Discount Co Ltd* [1962] 1 All ER 385 at p 398:

... in order to determine this case *it is as well to remember what is the nature of a hire-purchase transaction*. It is in effect, though not in law, a mortgage of goods. Just as a man who buys land may raise part of the price by a mortgage of it, so, also, a man who buys goods may raise part of the price by hire-purchase of them. And just as the old mortgage of land was not what it appeared to be, so, also, the modern hire-purchase of goods is not what it seems to be. One might well say of a hire-purchase transaction what Maitland said of a mortgage deed: 'That is the worst of our mortgage deed ... it is one long *suppressio veri* and *suggestio falsi*': see his LECTURES ON EQUITY (2nd Ed, 1949), p 182. Take this present transaction. If you were able to strip off the legal trappings in which it has been dressed and see it in its native simplicity, you would discover that *the appellant agreed to buy a car from a dealer for £405 but he could only find £105 towards it. So he borrowed the other £300 from a finance house and got them to pay it to the dealer, and he gave the finance house a charge on the car as security for repayment*. But if you tried to express the transaction in those simple terms, you would soon fall into troubles of all sorts under the Bills of Sale Acts, the Sale of Goods Act, and the Moneylenders Acts. *In order to avoid these legal obstacles, the finance house has to discard the role of a lender of money on security and it has to become an owner of goods who lets them out on hire*: see *Re Robertson, Ex p Crawcour, McEntire v Crossley Brothers, Ltd*. So it buys the goods from the dealer and lets them out on hire to the appellant. The appellant has to discard the role of a man who has agreed to buy goods, and he has to become a man who takes them on hire with only an option to purchase: see *Helby v Matthews*. And when these new roles have been assumed, the finance house is not a moneylender but a hire-purchase company free of the trammels of the Moneylenders Acts: See *Transport & General Credit Corpn, Ltd v Morgan* [1939] 2 All ER 28; [1939] Ch 551). *So you arrive at the modern hire-purchase transaction whereby (i) the dealer sells the goods to a finance house for cash; and (ii) the finance house lets them out on hire to a hirer in return for*

rentals which are so calculated as to ensure that the finance house is eventually repaid the cash with interest; and (iii) when the finance house is repaid, the hirer has the option of purchasing the car for a nominal sum. The dealer is the *intermediary* who arranges it all. The finance house supplies him with the printed forms, and he gets them signed. In the result, the finance house buys a car it has never seen, and lets it to a hirer it has never met, and *the dealer seemingly drops out*.

When hire-purchase transactions were first validated by this House in 1895 in *Helby v Matthews*, the contract of hire had most of the features of an ordinary hiring. In particular, the hirer was at liberty to terminate the hiring at any time without paying any penalty. He could return the goods and not be liable to make any further payments beyond the monthly sum then due. There was no clog on his right to terminate. And this was one of the reasons why the House saw nothing wrong with the transaction. LORD MAC NAGHTEN in characteristic fashion pointed out what a benefit this was to the hirer:

> ... if a coveted treasure is becoming a burthen and an encumbrance it is something, surely, to know that the transaction may be closed at once without further liability and without the payment of any forfeit.

[29] *Helby v Matthews* and *Bridge v Campbell* were referred to in *United Engineers v Lai Ping Yoon* where in his judgment, Gill J (as His Lordship then was) at pp 193–194 also set out how the House of Lords in *Helby v Matthews* distinguished *Lee v Butler* [1893] 2 QB 318:

Perhaps it will be useful at this stage to discuss the development and nature of hire-purchase transactions. As Cheshire and Fifoot on the *Law of Contract* (6th Ed) says at page 179, hire-purchase agreements had their origin in the desire on the part of manufacturers and traders to reach potential customers who could not afford at once to pay the price of their goods. Suppliers began to make contracts under which the price was payable by instalments and the possession of the goods passed at once to the customer, but they retained ownership until the last instalment had been paid. By this means they hoped to protect themselves even if the customer, before completing payment, improperly sold the goods to an honest buyer. But by section 9 of the Factors Act, 1889, substantially reproduced in section 25(2) of the Sale of Goods Act 1893, a person who has agreed to buy goods and who has obtained possession of them with the seller's consent may, by delivering them to a bona fide purchaser or pledgee, pass a good title. A case in point is the case of *Lee v Butler* [1893] 2 QB 318 in which one WE Hardy on May 5, 1892 let furniture on a 'hire and purchase agreement' to Helen Caroline Lloyd who was to pay £1 on May 6 and the balance of £96 4s on August 1st, 1892. The furniture was to become Mrs Lloyd's property only when the final payment was made. Hardy duly assigned the agreement and all his interests thereunder to the plaintiff. Before the condition of the agreement was satisfied Mrs Lloyd sold and delivered the furniture to the defendant in whose possession it was when the action was brought. The Court of Appeal held that on the proper construction the agreement Mrs Lloyd was under an obligation to pay all the instalments and that she had therefore 'agreed to buy the furniture'. She had accordingly passed a good title to the defendant who could not be sued by the plaintiff.

In *Helby v Matthews* [1895] AC 471 the owner of a piano agreed to let it on hire to one Brewster. The hirer was to pay the rent by monthly instalments, on the terms that the hirer might terminate the hiring by delivering up the piano to the owner, he remaining liable for all arrears of hire. The agreement also provided that if the hirer should punctually pay all the monthly instalments, the piano should become his sole and absolute property, and that until such full payment the piano should continue to be the sole property of the owner. The hirer received the piano, paid a few of the instalments and pledged it with a pawnbroker as security for an advance. In an action by the owner against the pawnbroker for conversion of the piano the pawnbroker contended that Brewster had 'agreed to buy' the piano and so passed a good title under section 9 of the Factors Act, 1889. This contention was upheld by the Court of Appeal, but the decision of that court was reversed by the House of Lords. The decision of the House of Lords was that upon the true construction of the agreement the hirer was under no obligation to buy but had an option either to return the piano or to become its owner by payment in full, that by putting it out of his power to return the piano he had not become bound to buy, that he had therefore not 'agreed to buy the goods' within the meaning of section 9 of the Factors Act, and that the owner was entitled to recover the piano from the pawnbroker. *Lee v Butler was distinguished on the ground that*:

> There was there an agreement to buy. The purchase-money was to be paid in two instalments, but as soon as the agreement was entered into there was an absolute obligation to pay both of them, which might have been enforced by action. The person who obtained the goods could not insist upon returning them and so absolve himself from any obligation to make further payment (per Lord Herschell LC at page 478).

Helby v Matthews is the leading case on hire-purchase agreements and the hire-purchase agreement which the House of Lords had to consider in that case has been the basis of all hire-purchase agreements ever since. In Bridge v Campbell Discount Co Ltd [1962] 1 All ER 385 at page 398 Lord Denning said:

> When hire-purchase transactions were first validated by this House in 1895 in *Helby v Matthews*, the contract of hire had most of the features of an ordinary hiring. In particular, the hirer was at liberty to terminate the hiring at any time without paying any penalty. He could return the goods and not be liable to make any further payments beyond the monthly sum then due. There was no clog on his right to terminate. And this was one of the reasons why the House saw nothing wrong with the transaction.

[30] His Lordship then referred to the nature of a hire purchase transaction as explained by Lord Denning in his judgment in *Bridge v Campbell Discounts Co Ltd* (which we have referred to at para 28 of this judgment).

[31] Further at p 194, His Lordship explained:

> *A contract where the property passes at once but the price is payable by instalments is clearly a credit sale. A hire-purchase agreement is more than a simple contract of hire, for it confers upon the hirer an option to purchase the goods. Thus a bailment coupled with*

an option to buy, as in Helby v Matthews, is clearly a hire-purchase agreement. By granting the option, the owner makes an irrevocable offer to sell the goods to the hirer if the conditions laid down in the agreement are fulfilled. On his part, however, the hirer is under no obligation to buy the goods. He may exercise the option, that is to say, he may accept the offer once he has fulfilled the conditions, if he so wishes, but he may also elect to terminate the hiring and return the goods to the owner without buying the goods. He has a power to accept the offer, but is not bound to do so. The importance of the option to purchase lies in the fact that the hirer is unable to pass a good title to a third party, because he is not a person who has bought or agreed to buy the goods. Since the property in the goods remains in the owner who lets them on hire, the retention of the ownership of the goods and the inability of the hirer (except in special circumstances) to pass a good title provide the owner with some measure of security in case the hirer defaults. The hirer, on the other hand, obtains the benefit of a credit transaction in that he receives the possession and use of the goods in advance of the payment of the price, and is enabled to purchase the goods once the price has been paid. (See *Guest on the Law of Hire-Purchase*, pages 10 and 11, paragraphs 23 and 25).

[32] A true hire purchase agreement as explained in *Helby v Matthews* was subsequently referred to with approval in *Anglo-American Corporation*, where in delivering the judgment of this court, Gill FJ said at p 14:

A true hire-purchase agreement, as explained by the House of Lords in *Helby v Matthews*, is an agreement by which the owner of a chattel lets it out on hire and undertakes that it shall become the property of the hirer when the hirer has paid the last of a certain number of payments specified in the agreement, but so that the hirer may return the goods at any time without any obligation to pay any balance of rent accruing after the return. Until those conditions have been fulfilled the property remains in the owner. Since no property in the chattel passes to the hirer until he has made the last of the payments specified in the agreement, the agreement need not be registered as a bill of sale. Such an agreement differs from a sale inasmuch as the hirer does not agree to buy. He merely has an option to buy on fulfilment of certain conditions, or he may return the goods on payment of a sum stated in the contract. In other words, a hire-purchase agreement is not an agreement to buy goods, unless it contains an obligation whereby the hirer is bound to buy.

The hallmark of a true hire-purchase agreement is that there is reserved to the hirer power to return the goods, either during the hiring, thereby determining the bailment, or after the conclusion of the hiring and before the payment of such further sum as is required to complete the purchase, so that the agreement is not a contract of sale but an agreement to hire with an option to purchase. In short, it is a bailment coupled with an option to buy. The agreement normally provides for a sum of money to be paid 'in consideration of the option to purchase' thereby granted either initially or at any time during the period of the hiring or at the end of the hiring.

[33] Learned counsel for the plaintiff contended that upon the enactment of the CPA, it must be assumed and considered that earlier provisions of law and decisions of the courts not in consonant with and contrary to the provisions of

A the CPA cannot be regarded as good law. Accordingly, he submitted that the decision in *Ahmad Ismail* was no longer applicable. We are unable to agree. The application of the CPA shall be supplemental in nature, and shall be without prejudice to any other law regulating contractual relations. This is clear from s 2(4) of the CPA which provides:

B

> The application of this Act shall be *supplemental* in nature and *without prejudice* to any other law regulating contractual relations.

[34] In this regard, in *Public Prosecutor v Viran* [1947] 1 MLJ 62, in a C criminal appeal from the decision of a district judge, the court had to construe the effect of s 3 of the Firearms and Ammunitions (Unlawful Possession) Ordinance 1946 ('the Ordinance No 28') which provides:

> 3 *Without prejudice* to the provisions of any written law in force in any part of the Malayan Union relating to unlawful possession of arms or ammunition, any person D who shall, after the commencement of this Ordinance, be in unlawful possession of any firearm or ammunition shall be liable to imprisonment of either description for a term which may extend to ten years or to a fine not exceeding ten thousand dollars or to both such imprisonment and fine.

E

[35] We find the following remarks by Spencer-Wilkinson J in that case instructive with regards to the use of the phrase 'without prejudice' in the aforesaid provision:

> The next question is whether this general rule is affected in this instance by the F opening phrase of Section 3 of Ordinance No 28. I think the meaning of the expression 'without prejudice' in the context is not really open to doubt. One meaning of the expression 'to prejudice' is 'to impair', and I read the words 'without prejudice to the provisions of any written law in force in any part of the Malayan Union relating to unlawful possession of arms or ammunition' as meaning that what G follows is not to impair the force of any of the existing provisions and is therefore not to override or repeal them.

[36] Reverting to s 2(4) of the CPA, the effect of the words 'without prejudice' ('tanpa menjejaskan' in the national language text) in that section is H that the application of the CPA is not to impair the force of any other law regulating contractual relations. The CPA does not override or repeal any other law regulating contractual relations. The CPA supplements the latter. In our view, the HPA and the laws relating to it which come within the ambit of 'any other law regulating contractual relations' continue to apply together with the I CPA. Hence, the principle decided in *Ahmad Ismail* relating to contractual relations in a hire purchase transaction is still applicable.

[37] As we have said, the plaintiff's pleaded case against the first defendant was that he purchased the car from the first defendant, and that the latter was

liable as a 'supplier' for the alleged breach of the provision relating to implied guarantee under s 32 of the CPA, and alternatively, for breach of the provision relating to implied warranty or condition as to quality and fitness under s 16 of the SGA. It was contended on behalf of the plaintiff that the receipt of a sum of RM71,506.45 by the first defendant and the issue of the sale invoice (exh P3) as well as the delivery order (exh P6) established the existence of a contract of sale between the plaintiff and the first defendant. However, it is an agreed fact that the second defendant provided hire purchase facility to the plaintiff for the purchase of the car (*defendan kedua telah memberi kemudahan sewa beli kepada plaintif bagi pembelian kenderaan Toyota Camry 2.0G (A) dengan nombor pendaftaran AHC 9928* (*selepas ini dikenali sebagai 'kenderaan tersebut'*)) (see p 97 of *rekod rayuan* (*Jld* 3)). In fact, credit facility for RM80,000 was provided by the second defendant. In this regard, it is also clear that on 22 March 2010, the plaintiff and the second defendant entered into a hire purchase agreement (exh P5, pp 283–288, *rekod rayuan* (*Jld* 6)). Under this hire purchase agreement, the plaintiff is 'the hirer' of the car and the second defendant is 'the owner'. Under the law what was obtained by the plaintiff under P5 was possession, not ownership of the car which remained with the second defendant. Under cl 15(1) of P5, the plaintiff may at any time terminate the agreement by returning the car to the second defendant. Under cl 16, the second defendant as owner may terminate the hiring under P5 and resume possession of the car in the circumstances provided for in that clause. In cl 17 (option to purchase), it is provided that if the hirer duly performed and observed all the stipulations and conditions in this agreement and pay to the owner all sums of money payable to the owner by the hirer, the hirer shall have an option of purchasing the goods and upon payment of the last instalment, the hirer is deemed to have exercised such option and the hiring shall come to an end and the goods shall become the property of the hirer and the owner shall assign all rights, benefits and interests in the goods to the hirer. But, until the option has been exercised, the goods shall remain the absolute property of the owner and the hirer shall not have any right or interest in the goods other than of a bailee. It must also be added that the fact that (as shown in the registration card) (p 270, *rekod rayuan* (*Jld* 6)) the plaintiff was the registered owner of the car did not make him the legal owner of the car (see *Credit Corporation (M) Bhd v The Malaysia Industrial Finance Corpn & Anor* [1976] 1 MLJ 83, per Abdul Hamid J (later CJ)) at p 86, *Butterworth Used Cars Sdn Bhd lwn Mayban Finance* [1991] MLJU 19; [1991] 1 CLJ Rep 520, per Abdul Hamid Mohamed PK (later CJ) at p 523). P5 is the type of hire purchase agreements to which the HPA applies so that until the plaintiff has exercised his option to purchase the car by paying all the sum of money payable under the agreement and fulfilling all of his obligations under the agreement and paying the last instalment, no property in the car passes to the plaintiff and he is only a bailee. In the sale invoice (exh P3), in the column 'term', (which must be the term of the transaction of the purchase of the car), it is stated as 'Hire Purchase'. Much was made by learned counsel for the plaintiff of the receipt of RM71,706.45 by

the first defendant from the plaintiff. But, this, as described in exh P3, was actually paid as 'Deposit', the payment of which is a requirement of entering a hire purchase agreement under the HPA. Under s 31 (provision of minimum deposits) of the HPA, an owner who enters into a hire purchase agreement without having first obtained a deposit in cash or in goods, or partly in cash and partly in goods, to a value of not less than one-tenth of the cash price shall be guilty of an offence under the Act. Under s 32(2) of the HPA, the provision as to obtaining of a deposit shall be deemed to have been complied with by the owner if a deposit has been obtained by *the dealer*, or an agent or employee of the owner. In *Chan Hoon Piaw & Anor v Cempaka Finance Bhd* [2002] MLJU 812; [2003] 1 CLJ 762, James Foong J (later FCJ) said at p 765 (CLJ):

> *In fact s 32 of the Hire-Purchase Act 1967 even allows a presumption that the mandatory deposits, required by the law to be made by the hirer to the owner in a hire purchase transaction, as having been made by the hirer if there had been earlier payment of such sums to the dealer*. With such acknowledgment, I am of the view that the down payment made by the 1st defendant to the dealer in this case could not have been taken as conferment of ownership to the hirer of the said goods. Such payment would be treated as deposit towards the hire purchase, as was probably the case, by the reflection of the invoice which was addressed to the plaintiff from the dealer.

[38] Applying *Ahmad Ismail* to the facts of this case, whatever contractual relationship between the plaintiff and the first defendant was superseded by the hire purchase agreement (exh P5). The first defendant completely faded out of the picture, and the only contract that remained was the hire purchase agreement (exh P5) entered into between the plaintiff and the second defendant.

[39] On the plaintiff's contention on the alleged liability of the first defendant under s 32 of the CPA, that provision provides:

> 32 Implied guarantee as to acceptable quality
>
> (1) Where goods are *supplied* to a consumer there shall be implied a guarantee that the goods are of acceptable quality.
>
> (2) For the purposes of subsection (1), goods shall be deemed to be of acceptable quality —
>
> (a) if they are —
>
> (i) fit for all the purposes for which goods of the type in question are commonly supplied;
>
> (ii) acceptable in appearance and finish;
>
> (iii) free from minor defects;
>
> (iv) safe; and
>
> (v) durable; and

[40] Section 39 of the CPA provides that Part VI of the CPA gives *a consumer* a right against *a supplier* of goods where the goods fail to comply with any of the implied guarantees under ss 31–37. A

[41] Under s 3 of the CPA, 'supplier' means a person who, in trade: B

> (a) supplies goods to *a consumer* by *transferring* the *ownership* or *possession* of the goods under a contract of sale, exchange, lease, hire or *hire purchase* to which that person is a party.

[42] To complement that provision, under s 3 of the CPA, 'supply' in relation to: C

> (a) goods, means to supply or resupply by way of sale, exchange, lease, hire or *hire purchase.*

D

[43] Therefore, the question which arises is whether under the CPA the first defendant was the supplier who supplied the car to the plaintiff (as a consumer)? In order to be a 'supplier' under s 3 of the CPA, the person must have, in trade, supplied goods: E

(a) by transferring *ownership* of goods under a contract of sale, exchange, lease, hire or hire purchase; or

(b) by transferring *possession* of goods under a contract of sale, exchange, lease, hire or hire-purchase.

F

[44] In the present case, until the execution of the hire purchase agreement (P5), there was no contract of sale, exchange or lease under which the ownership of the car or possession in law of the car was transferred by the first defendant to the plaintiff. More importantly, applying *Ahmad Ismail*, with the execution of P5, the only contract that remains is P5. It is under P5 that the possession in law of the car was transferred to the plaintiff (as hirer) by the second defendant (as owner), not the first defendant. Hence, under the CPA, the first defendant was not the supplier of the car to the plaintiff. G

[45] This brings us to the plaintiff's case on the alleged breach of the provision relating to implied warranty or condition as to fitness under s 16 of the SGA. Section 16 of the SGA provides: H

> 16 Implied condition as to quality or fitness
>
> (1) Subject to this Act and of any other law for the time being in force, there is no implied warranty or condition as to the quality or fitness for any particular purpose *of goods supplied under a contract of sale*, except as follows: I
>
> where the buyer, expressly or by implication makes known to the seller the particular purpose for which the goods are required, so as to show that the buyer

relies on the seller's skill or judgment, and the goods are of a description which it is in the course of the seller's business to supply (whether he is the manufacturer or producer or not) there is an implied condition that the goods shall be reasonably fit for such purpose:

> Provided that, in the case of a contract for the sale of a specified article under its patent or other trade name there is no implied condition as to its fitness for any particular purpose ...

[46] The implied condition as to quality or fitness under s 16 applies to *goods supplied under a contract of sale*. Section 4 of the SGA provides:

> 4(1) A *contract of sale* of goods is a contract whereby the seller *transfers or agrees to transfer* the property in goods to the buyer for a price. There may be a contract of sale between one part-owner and another.
>
> (2) ...
>
> (3) Where under a contract of sale the property in the goods is transferred from the seller to the buyer, the contract is called a sale, but where the transfer of the property in the goods is to take place at a future time or subject to some condition thereafter to be fulfilled, the contract is called an agreement to sell.
>
> (4) An agreement to sell becomes a sale when the time elapses or the conditions are fulfilled subject to which the property in the goods is to be transferred.

[47] Applying *Ahmad Ismail*, with the execution of the hire purchase agreement (P5) there is no contract of sale or an agreement to sell as defined in s 4 of the SGA between the first defendant and the plaintiff. The first defendant did not transfer or agree to transfer the property in the said car to the plaintiff. Indeed, given the hire purchase transaction in this case, the car was sold by the first defendant to the second defendant pursuant to which the property in the car passed to the latter, making it the owner of the car, enabling it to hire it out to the plaintiff under P5.

[48] Reference may be made to *Drury v Victor Buckland Ltd* [1941] 1 All ER 269. The case concerns a claim of breach of warranty under s 14 of the English Sale of Goods Act 1893, which is in pari materia with s 16(1) of the SGA. 'Contract of sale' referred to in s 14 of the English Act is defined in s 1 of the English Act and that definition is in pari materia with the definition of contract of sale in s 4 of the SGA. The head notes of the case reveal the following facts. The plaintiff (Mrs Drury) was approached by an agent of the defendants (Victor Buckland Ltd), the dealer, with reference to the purchase of an ice-cream maker. After some negotiation the plaintiff paid £10 10s 0d deposit to the defendants, and agreed to discharge the balance by paying a number of instalments to a finance company (Equipment Trust Co Ltd). Each of these instalments included an interest charge. The full terms were set out in an invoice sent to her by the defendants, but she entered into a hire purchase

agreement with the finance company and signed a delivery note sent by them. The plaintiff subsequently alleged that the machine was unsatisfactory, and thereupon sued the defendants for breach of implied warranty under the Sale of Goods Act 1893, s 14. She contended that the transaction was a sale by the defendants, but the defendants contended that the transaction was a contract of hire purchase between the plaintiff and the finance company. The County Court judge awarded damages to the plaintiff. On appeal, it was held by the Court of Appeal that in the circumstances of this case, the contract was one of hire purchase and not one of sale, and the action failed.

[49] In his judgment, Scott LJ said at p 272:

> The question we have to decide is this. The county court judge held that there was no real transaction of hiring, but that there was a sale. Was there any evidence upon which he was justified in coming to that conclusion? Was there evidence which was fit to be submitted to a jury if the case had been tried by a jury? I think myself that it is clear on the documents and on Mrs Drury's own evidence that the transaction was one which she understood quite well — namely, that she was getting the apparatus on hire-purchase. That she knew anything about the law of hire-purchase, or the difference between an ordinary purchase and a hire-purchase, I doubt, but the documents speak for themselves. In my view, as she signed the hire-purchase agreement and then signed the hire- purchase delivery note, and paid the hire-purchase instalments to the finance company, there can be no doubt that that was the reality of the transaction. It was a matter of indifference to the defendants whether they got the cash from her — obviously her credit was not good enough for them — or some cash instalments somehow and the credit of the finance company, which obviously was satisfactory to them. Consequently, I can see no evidence at all before the county court judge which justified him in coming to the conclusion that the transaction was one of sale, and that the hire-purchase agreement had no reality in it. ...
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> ...
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> ... These cases are always pure questions of fact, in the light of the documents, as to what the transaction in fact was. Here, the evidence outside the documents supports the documents, and I do not think that there was any evidence before the county court judge which justified him in saying that the documents did not represent the reality. *I think that the document called the hire-purchase agreement was the reality, and that the use of an invoice form* by the defendant company was not any evidence in the circumstances, that there had been a sale by them. Being merchants, they would naturally send out an invoice, and very likely they would not think that the word 'invoice' at the top of the document made any difference. That they realised what the nature of the transaction was, however, appears from the contents of the invoice, to which I have referred — namely, that there was to be a deduction of the amount of the first payment, and that the balance was to be the subject of a hire-purchase agreement, including interest charges payable to the finance company, out of which it made its profits, and that there was to be payment to them, or to somebody, by thirty-six monthly instalments, which in fact were instalments covered by the hire-purchase agreement of even date. *It was a sale by the Buckland company to the*

A *hire-purchase company*. The property passed to them on the terms that they would get paid by the hire-purchase company, as no doubt they were in fact. Therefore, the claim against them for damages for breach of warranty is a cause of action unsupported by any contract of sale which would carry it, and the appeal must be allowed, with costs here and below.

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[50] On the cases referred to by learned counsel for the plaintiff, we do not think any of them provide authoritative support for the plaintiff's case. In the New Zealand case of *Stephens v Chevron Motor*, it was submitted by learned counsel for the plaintiff in his written submission that 'the purchaser purchases C a car from a dealer. The consumer obtained hire purchase facility from a finance company'. It is not clear to us from the judgment whether that was really the case. In the judgment we find no mention at all about any finance company, let alone its role in giving hire purchase facility to the plaintiff. It is true that in the judgment it is stated that the appellant, 'stopped the hire purchase payments'. D That appears to be about the only part where 'hire purchase' was mentioned in the judgment. In the absence of anything more, it would be speculative on our part to conclude that hire purchase facility must have been given by a finance company. Moreover it is not clear whether the material provisions under our CPA relevant to the case before us were also available under the New Zealand E Consumer Guarantees Act 1993 and, if so, whether the provisions in the New Zealand Act are similar to the provisions under our CPA. It is also not clear what was the position of the New Zealand Act in relation to contractual relations under hire purchase and sale of goods laws. As for the other New Zealand's case of *Cooper v Asley*, it was not a case involving a hire purchase F transaction. Similarly, the Malaysian Court of Appeal cases of *Puncak Niaga (M) Sdn Bhd v NZ Wheels Sdn Bhd* and *Matang Plastik & Metal Work Industries Sdn Bhd v Daimler Chrysler* are also cases not concerning hire purchase transactions. In the Kuching High Court case of *Heng Long Motor Trading v Osman b. Abdullah*, the factual matrix is essentially similar to that in *Ahmad* G *Ismail*. In *Heng Long Motor Trading*, like in *Ahmad Ismail*, out of the purchase price of RM13,500, the purchaser paid a deposit and part payment of RM5,200 to the dealer and entered into a hire purchase agreement with the finance company to finance the balance of the purchase price of the van (RM8,000). In such a case we agree with the Court of Appeal that the fact that H the purchaser in *Heng Long Motor Trading* relied on the Sale of Goods Act 1983 (UK), whereas the plaintiff in *Ahmad Ismail* based its case on the HPA is not a distinguishing factor. Thus, the Court of Appeal held (and in our view rightly), that:

I Regardless of whether the plaintiff's claim is founded on the CPA or the SGA 1957, the plaintiff must cross the threshold of establishing that he has a contractual relationship with the car dealer in order to found the claim. The ratio decidendi of the Federal Court in *Ahmad Ismail*'s case is quite clear. Once the plaintiff has entered into the hire-purchase agreement with the finance company, any contractual relationship between the plaintiff and the car dealer has been extinguished; the legal

effect of which is that the plaintiff has no claim against the car dealer.

CONCLUSION

[51] Our answer to the question of law (in respect of which the application for leave to appeal in this case was allowed) which we have amended slightly as set out in para [25] of this judgment is as follows. On the facts and the circumstances of this case, the contractual relationship between the dealer and the consumer was superseded by the hire purchase agreement as decided in the Federal Court case in *Ahmad Ismail*. Section 32 of the CPA and s 16 of the SGA do not apply to make the dealer liable to the consumer.

[52] We would also say in passing that the plaintiff was not without any remedy under the law in the first place. It was possible for him to plead his case under s 8 of the HPA. Indeed in this case he had pleaded his case under the CPA and obtained judgment against the second defendant (the financier) in the High Court. However, as it transpired, the Court of Appeal allowed the second defendant's appeal against that decision apparently on the ground that the plaintiff's statement of claim did not plead and did not disclose any cause of action against the second defendant. There was no further appeal by the plaintiff against that decision of the Court of Appeal.

[53] In the result, the plaintiff's appeal is dismissed with costs. The decisions of the High Court and the Court of Appeal are affirmed.

Appeal dismissed with costs.

Reported by Afiq Mohd Noor